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IN THE
COURT OF APPEALS OF INDIANA

JOHN N. APPLEGATE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0702-CR-84
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas L. Ryan, Judge
Cause No. 02C01-9407-CF-294

July 6, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

John N. Applegate ("Applegate") pleaded guilty in Allen Circuit Court in 1994 to murder and was sentenced to sixty years. In this belated appeal, he raises two issues:

> I. Whether his sentence violates his Sixth Amendment rights as set forth in Blakely v. Washington; and,
>
> II. Whether his sentence is inappropriate in light of the nature of the offense and character of the offender.

We affirm.

Facts and Procedural History

On November 29, 1994, on the second day of jury trial, Applegate pleaded guilty to the murder of his grandmother, Florence Dornte, and to eighteen counts of Class D felony theft. At the conclusion of a sentencing hearing conducted on January 27, 1995, the trial court found three aggravating circumstances: 1) the victim's relationship and dependence on Applegate, 2) that Applegate had relied on deception and concealment to create the impression that Dornte was still alive, and 3) that Applegate was in need of correctional and rehabilitative treatment best provided by a penal facility. Tr. Vol. V, pp. 48-50. The court imposed an enhanced sentence of sixty years for murder and concurrent one and one-half year sentences for each theft conviction. Applegate filed a petition for permission to file a belated notice of appeal on May 22, 2006, and filed his belated notice of appeal on November 1, 2006.[1] Additional facts will be provided as necessary.

[1] The trial court granted Applegate permission to file a belated appeal on October 2, 2006. The State does not argue on appeal that such permission was improvidently granted pursuant to Post Conviction Rule 2(1).

Discussion and Decision

Applegate argues that his sentence violates the rule announced in Blakely v. Washington, 542 U.S. 296 (2004). Belated appeals of sentences entered before Blakely are not subject to the holding in that case. Gutermuth v. State, No. 10S01-0608-CR-306 (Ind. June 20, 2007).

Applegate contends that the trial court improperly considered as an aggravating factor that he is in need of correctional and rehabilitative treatment that is best provided by a penal facility. Our supreme court has held that the factor "in need of rehabilitative treatment" as an aggravating circumstance applies when the trial court explains why the specific defendant needs treatment provided in a penal facility. Cotto v. State, 829 N.E.2d 520, 524 (Ind. 2005). In order to support use of that factor, however, the trial court must give a specific and individualized statement explaining why extended incarceration is appropriate. Id.

When a court has relied on both valid and invalid aggravators, the standard of review is whether we can say with confidence that, after balancing the valid aggravators and mitigators, the sentence enhancement should be affirmed. See Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005). Under the facts and circumstances of Applegate's offense, we can say without hesitation that the trial court would have imposed an enhanced sentence even without considering the improper aggravator.

Next, Applegate argues that his sentence in inappropriate. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the

offense and character of the offender. Ind. Appellate Rule 7(B) (2007); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

Applegate agreed with an associate to drive his grandmother to a remote location, where he exited the car and allowed the associate to strangle and suffocate her. After taking steps to conceal her death, Applegate continued to use his power of attorney to cash and write checks on his grandmother's accounts. In light of these facts and circumstances, a maximum sentence is entirely appropriate.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.